

This claim is now pending before the Kansas Court of Appeals; accordingly, the transcripts of the depositions and hearings that were held in this claim have been forwarded to the appellate court. The record that is available to the Board at this juncture is the administrative file compiled by the Division of Workers Compensation and the transcript from the February 6, 2009, hearing before Judge Fuller.

ISSUES

This is a post-award proceeding for penalties. Judge Fuller issued an Award in this claim on January 4, 2008, and awarded the claimant permanent total disability benefits. Respondent appealed that Award to this Board, which issued its Order on May 29, 2008. The Board affirmed the Judge's finding that claimant was permanently totally disabled and also ordered respondent to provide claimant a list of three physicians for claimant to select a treating doctor. That Order was then appealed to the Kansas Court of Appeals, where it is now pending. In this request for penalties, claimant maintains respondent should be sanctioned for failing to comply with the Board's direction to provide claimant a list of three physicians from which claimant would select a doctor for ongoing medical treatment.

The parties appeared before Judge Fuller on February 6, 2009, to address claimant's request for penalties. At the start of the hearing the Judge indicated claimant's request for penalties was premised upon respondent's terminating medical benefits. Finding the claim was now pending before the Court of Appeals, the Judge ruled she did not have jurisdiction to hear claimant's request for penalties. At the hearing the Judge stated, in part:

And the reason the Court says, apparently, is because when the motion [for penalties] was filed, this case was actually before the Court of Appeals, or it could have been at the Board. I don't know exactly when the motion was filed. But when the motion was filed, it was sent to wherever the file was. Then it was noticed up for hearing, and at this point the Court of Appeals still has the file.

I do not know what all issues are before the Court of Appeals. I -- I don't know what their ruling is going to be and at this point don't believe I have any jurisdiction to take up any issue in this matter and I'm not comfortable doing so without having a file and knowing what issues are before the Court and whether this is one of them and whether their decisions could be determinative as to this issue.

So based on that, we will not have a hearing today and that should give you your sufficient order that you want to appeal it.¹

. . . .

I think at this point we can let [the exhibits] all be attached. I'm not admitting them as evidence. We'll let whatever court decides to take this up or if they choose to reverse and send it back down to me, then I'll take up the issue. But it's speculative whether we're asking for -- I think we're actually asking for penalties and additional medical treatment. I'm just not sure we're in the right form [*sic*], but it's

¹ P.H. Trans. (Feb. 6, 2009) at 4, 5.

hard to figure any of that out without seeing the prior orders in the case which I don't have and I don't have a file² and I don't know what rulings the Court is going to make, the Court of Appeals, on this file.

So based on that, we're adjourned.³

Claimant argues Judge Fuller erred by finding that she lacked jurisdiction to decide claimant's request for penalties. Citing K.S.A. 44-556(b), claimant maintains the Board's order directing respondent to provide claimant with a list of three physicians' names was not stayed when respondent appealed to the Court of Appeals. Moreover, claimant argues respondent did not comply with that order until September 2008 and since that time respondent has unilaterally decided not to authorize any physician to provide treatment. In summary, claimant requests the Board to issue another order directing respondent to provide an authorized physician and to remand this request for penalties back to Judge Fuller to determine what sanctions, if any, are appropriate.

Respondent interprets claimant's request for penalties as also including a request for additional medical treatment. Respondent argues that by determining to forego deciding the penalties request, "claimant's request for penalties for terminating medical benefits was denied."⁴ Moreover, respondent contends the Judge does not have jurisdiction to enter any orders while this claim is on appeal to the Court of Appeals. In the alternative, respondent argues the Judge was prudent in declining to rule on claimant's request for penalties as the Judge does not have any case file to determine whether the issues on appeal would be affected by her order. In the alternative, should the Board decide to address the request for penalties, respondent argues that it complied with the Board's order to provide a list of physicians for claimant to choose a doctor. And that claimant's lack of a treating physician is her own doing; namely, that her authorized physician refused to treat her after two separate drug screens failed to confirm that she was taking the medications that she had been prescribed.

Respondent requests the Board to affirm the Judge's decision that she has no jurisdiction to consider a motion for sanctions during the pendency of an appeal to the Court of Appeals. In the alternative, respondent requests the Board to deny the request for sanctions.

² The record certified to the Court of Appeals includes the original transcripts as well as photocopies made from the Judge's file and Director's file. But the original Judge's file and Director's file are retained by the Division of Workers Compensation and, thus, would have been available to the Judge.

³ P.H. Trans. (Feb. 6, 2009) at 8.

⁴ Respondent's Brief at 1 (filed Mar. 5, 2009).

The only issue before the Board on this appeal is whether the Judge erred in finding that she did not have jurisdiction to consider claimant's request for penalties because the claim is now pending before the Court of Appeals.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the administrative file, the transcript from the February 6, 2009, hearing, and considering the parties' arguments, the Board finds and concludes this proceeding should be remanded to the Judge to consider and determine claimant's request for penalties.

As indicated above, the Judge decided this claim on January 4, 2008. That Award was appealed to this Board, which directed respondent to provide claimant with the names of three physicians for her to choose an authorized doctor. The Board's Order, which was dated May 29, 2008, was then appealed to the Kansas Court of Appeals.

Without delving into the merits of the parties' arguments, respondent contends it complied with the Board's Order and claimant then selected Dr. Terry L. Troutt of Winchester, Kentucky, to treat her. But problems arose with continued treatment from Dr. Troutt due to two drug screens, which claimant maintains were unreliable. Accordingly, claimant now asserts she does not have an authorized doctor.

Claimant initiated this request for penalties. Respondent contends the Judge does not have the jurisdiction to enter any orders while this claim is on appeal to the Court of Appeals, where it remains. Claimant, however, contends an appeal to the Court of Appeals does not act as a complete stay and, therefore, the Judge has the authority to address her request for penalties. The Board agrees.

K.S.A. 2008 Supp. 44-556(b) provides that there are two periods for which compensation is not stayed when there is an appeal to the Court of Appeals; namely, the 10-week period before the Board's order and the period between the Board's order and the Court of Appeals' decision. K.S.A. 2008 Supp. 44-556(b) provides:

Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review.

And if compensability of the claim is not an issue on review, the Workers Compensation Act provides that medical compensation is not stayed while the claim is on appeal to the

Court of Appeals. Indeed, a worker may even seek additional medical compensation under K.S.A. 44-510k while the claim is on review. K.S.A. 2008 Supp. 44-556(g) provides:

In any case in which any review is sought under this section and in which the compensability is not an issue to be decided on review, medical compensation shall be payable and shall not be stayed pending such review. The worker may proceed under K.S.A. 44-510k and amendments thereto and may have a hearing in accordance with that statute to enforce the provisions of this subsection.

And in this claim, the compensability of claimant's May 1, 2003, accident is not an issue.

The penalties statute, K.S.A. 44-512a, is one of the remedies the legislature has given injured workers to pursue enforcement of their awards. Another remedy is the fraud and abuse statute, K.S.A. 44-5,120. For example, it is a fraudulent or abusive practice to willfully, knowingly or intentionally:

(13) [instruct] or [encourage] employers to violate the employee's right to medical benefits under the workers compensation act;

. . . .

(15) [fail] to confirm medical compensation benefits coverage to any person or facility providing medical treatment to a claimant if a clear and legitimate dispute does not exist as to the liability of the insurance carrier, self-insured employer or group-funded self-insurance plan;

(16) [fail] to initiate or reinstate compensation when due if a clear and legitimate dispute does not exist as to the liability of the insurance company, self-insured employer or group-funded self-insurance plan;

. . . .

(18) [refuse] to pay compensation as and when the compensation is due;

(19) [refuse] to pay any order awarding compensation.⁵

The Board concludes the Act gives injured workers the right to pursue the payment of compensation, including medical compensation, in certain instances despite the fact the claim is pending review by the Court of Appeals. And injured workers may seek penalties for the failure to pay the compensation that is due pending review. Accordingly, the Judge had the jurisdiction to address claimant's request for penalties.

⁵ K.S.A. 44-5,120(d).

The Judge expressed concern about not having the entire evidentiary record. The entire record, however, is not required. A penalties request under K.S.A. 44-512a is premised upon compensation not being paid when due. Accordingly, the worker's burden is to prove that compensation was awarded, it was not paid when due, and the procedural requirements of K.S.A. 44-512a have been met. Those issues are addressed by referring to the controlling order and through the evidence by the parties as to what has occurred following that order.

In summary, the Judge has the jurisdiction to address claimant's request for penalties. Therefore, this proceeding should be remanded to the Judge. The Board does not retain jurisdiction over this appeal. More importantly, the Board does not imply in any manner whether claimant's request for penalties has merit.

Claimant requests the Board to enter another order directing respondent to provide claimant with an authorized doctor. That order was entered by the Board in its May 29, 2008, Order. It does not require repeating. Moreover, a penalty proceeding is not the proper forum to seek an award of additional medical treatment.⁶

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁷ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

WHEREFORE, the Board reverses the February 9, 2009, Order as the Judge has jurisdiction to address claimant's request for penalties. The Board remands this proceeding to the Judge to address claimant's request for penalties. The Board does not retain jurisdiction over this claim.

IT IS SO ORDERED.

⁶ See K.S.A. 44-510k, which sets forth the procedure for post-award medical benefits. Also see K.S.A. 44-5,120, which provides that it is a fraudulent and abusive act to willfully, knowingly, or intentionally refuse to pay compensation when compensation is due, or refuse to pay any order awarding compensation.

⁷ K.S.A. 2008 Supp. 44-555c(k).

Dated this ____ day of April, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge